secretary, but no paralegal or bookkeeper. Charles and Bernard divide the profits on an equal basis, although Charles owns most of the physical assets of the law firm (Tr. 289-290, 316-318, 357). In 1991 and 1992, each had about $75,000 in income from the law firm. In 1993, each has so far received about $250,000 (Tr. 338, 351).

69. Charles and Bernard prepared and filed the Westerville application (Tr. 292-293, 295, 297-298, 300, 302-303, 322, 345, 373). Bernard signed the certification page (Tr. 363). At the time of preparing and filing the WII application, Charles and Bernard had no FCC counsel (Tr. 292-293). They intended to be equal partners and to share management duties at the station (Tr. 294, 362). Charles intended to be Assistant to the Program Director and Bernard intended to be Assistant to the Programming Director (Tr. 303, 363). They would each work 20 hours at the station and continue spending 35-40 hours per week practicing law (Tr. 331, 364-365). Nelson Embrey, a friend and experienced broadcaster, would play a significant management role at the station (Tr. 311-313, 315-316, 346, 364, 366).

70. After filing the Westerville application in Dec. 1991, Charles and Bernard retained FCC counsel for WII. They were told by counsel that WII's ownership structure and proposed management were inferior under FCC comparative policies. Counsel advised Charles and Bernard to reorganize the corporation to make Charles the sole voting stockholder and to make Bernard a non-voting stockholder. They were also advised that Charles should propose to be the full-time (40 hour per week) General Manager of the station and that Bernard should have no management duties. Charles and Bernard duly complied with the directive of their FCC counsel (Tr. 292-294, 305, 307-308, 361-362). They nevertheless still intend for Embrey to have a significant management role at the station. Charles may actually only serve as an assistant to Embrey, and not as General Manager (Tr. 313, 315-316, 346).

71. Charles claims that he will entirely give up his law practice and turn it over to Bernard, who would pay no consideration for it (Tr. 288, 300-301, 316,

319-320, 367). Charles would continue to pay half of the rent on the law firm office space (Tr. 318). He would not receive any income from the law firm and would not initially have a salary from the station (Tr. 319, 368).

72. By acquiring Charles' law practice, Bernard would be required to work 80 hours per week. He would need to hire an attorney to help him. Bernard has made no effort to obtain legal help (Tr. 301, 317, 344, 371). According to Charles, his transition from the law firm to the radio station would be gradual. He has no time frame in mind (Tr. 342-343).

73. Charles claims that he always intended to retire from the practice of law at this time, regardless of whether he went into the radio business as a full-time manager. Bernard contradicted him on this point. According to Bernard, Charles would have continued to practice law under the original part-time management plan (WII Ex. 2; Tr. 59-63, 365).

74. At the time of notifying the State of Ohio on Jan. 27, 1992, of the reorganization, Bernard was the Secretary of the corporation. The state has never been notified that Bernard is not the Secretary. Ohio law requires that a corporation have two separate officers to sign certain filings with the state (Davis Ex. 6; Tr. 323-329, 354). Moreover, according to Bernard, because of the 50/50 equity division of the corporation, Charles does not have positive control of the corporation and application, only negative control (Tr. 361).

75. WII has no checking account. All funds for the preparation and prosecution of the WII application have come from the law firm partnership account. Bernard is a 50% general partner of the law firm (Tr. 289, 356, 358-359, 367, 370).

76. Accordingly, the record as a whole demonstrates that WII is not entitled to integration credit. Its integration proposal is inherently incredible and incapable of effectuation. Moreover, Charles Wilburn, the purported integrated stockholder, conceded that he intends to retire at age 65. He will be 65 in April 1994. Thus, WII's integration proposal has no permanence. Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, 395, n. 6

(1965); Martin Intermart, Inc., 3 FCC Rcd 1650, 1652, para. 7 (Rev. Bd. 1988), integration credit to be awarded only to those proposals which will be adhered to on a permanent basis.

77. Another basis to deny integration credit is that Charles does not have positive control of the corporation and application, only negative control. Anax Broadcasting, 87 FCC2d 483, 488, para. 15 (1981), all legal control must be vested in the active integrated owner in order to receive integration credit.

78. A further basis to reject the WII integration proposal is that Bernard is not actually insulated from WII. Records on file with the State of Ohio show that he is still the Secretary of the corporation. A purportedly insulated stockholder serving as an officer of a corporation breaches the wall of insulation. Saltaire Communications, Inc., 8 FCC Rcd 6284, n. 2 (1993); Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5607, n. 27 (1991).

79. The wall of insulation has also been continuously breached by Bernard's control over the funds for the application. WII has no separate checking account. All funding and disbursements for the WII application have been through the checking account for the law firm in which Bernard is a 50% general partner. This is conclusive that Bernard has legal control over the WII application. Evergreen Broadcasting Co., 5607, n. 24; Richardson Broadcast Group, 1587, para. 25, 1590, n. 16; Isis Broadcasting Group, 5125, 5131-5132, paras. 23-25, aff'd, 7042, n. 8, the interest of a non-voting stockholder must be attributed where he controls the payment of bills.

(l) Whether the ALJ Erred in Not Specifying an EEO Abuse of Process Issue Against WII?

80. The ALJ, in MO&O, FCC 93M-610, erred in not specifying an EEO abuse of process issue against WII. See, ORA motion to enlarge, filed Aug. 23, 1993. This motion is based upon the deposition testimony of the Wilburns, dated July 14, 1993. The WII application as initially filed proposed to employ more than 5 full-time employees. However, no EEO program was submitted at that time.

Charles Wilburn conceded that the EEO program was not filed then because he did not have time to do it and did not know how to fill it out (CW Dep. Tr. 18-19). The EEO program which was eventually submitted was based entirely on the EEO programs of the competing applicants. Bernard Wilburn went to the local public library and copied the information in the applications on file. No independent research was done (BW Dep. Tr. 54-55).

81. Accordingly, an EEO abuse of process issue must be specified. The Wilburns admitted that a required EEO program was knowingly and intentionally not filed. The EEO program eventually submitted was plagiarized from the competing applications. Such a cavalier disregard for the Commission's filing requirements and EEO policies constitutes an egregious abuse of process. David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1261 (1992), an abuse of process can take many varied forms. Here, WII's abusive intent has been admitted to on the record.

(m) Whether the ALJ Erred in Not Specifying Tower Site Availability Issues Against Davis, Ringer, ASF, and WII?

82. The ALJ, in MO&O, FCC 93M-393 through FCC 93M-396, erred in not specifying tower site availability issues against Davis, Ringer, ASF, and WII. See, ORA motions to enlarge, filed May 25, 1993. These motions are based upon documents produced in discovery. Davis, Ringer, ASF, and WII specified the same tower site and each received an identical letter from the site owner in Dec. 1991. The letter states, in pertinent part, that the owner is "willing to negotiate" and has an intent to negotiate" as to use of its tower site. Moreover, "mutually acceptable terms" would be negotiated in the future.

83. Under long-established Commission policy, Davis, Ringer, ASF, and WII do not have "reasonable assurance" of their proposed tower site. National Communications Industries, 6 FCC Rcd 1978, 1979, para. 10 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703, para. 2 (1992), "reasonable assurance" of the availability of a tower site requires more than a "willingness to deal" on the part of the tower site owner; Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5846, para. 14 (Rev. Bd. 1991), the fact that the site owner could foresee no problem in giving a lease

does not constitute "reasonable assurance" where the lease terms remain to be negotiated; Adlai E. Stevenson, 5 FCC Rcd 1588, 1589, para. 6 (Rev. Bd. 1990), the fact that the site owner has indicated that he will discuss the possibility of a lease at some future date is insufficient; Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, para. 11 (1991), although rent and other details may be negotiated in the future, the basic terms of a tower site lease must be negotiated in order to possess "reasonable assurance; Lee Optical and Assoc. Cos. Retirement and Pension Fund Trust, 2 FCC Rcd 5480, 5486, para. 23 (Rev. Bd. 1987), even if a site owner would "favorably consider" use of his property and would at a future date "commence negotiations for finalizing arrangements," this is insufficient. Dutchess Communications Corp., 101 FCC2d 243, 253, para. 14 (Rev. Bd. 1985), an applicant is required to negotiate with a site owner in order to possess "reasonable assurance."

84. Accordingly, tower site availability issues must be specified against Davis, Ringer, ASF, and WII. All that they have from the tower site owner is an understanding that they will negotiate an agreement in the future. This is woefully inadequate.

(n) Whether the Commission's Integration Policy is Arbitrary and Capricious?

85. ORA challenges the Commission's integration policy under the Policy Statement on Comparative Hearings as arbitrary, capricious, irrational, and contrary to the public interest. See, Bechtel v. FCC; Flagstaff Broadcasting Foundation v. FCC. The superior engineering and signal coverage proposal of ORA, which would provide new service to under-served areas, would further the Commission's comparative hearing policies and the public interest much more than the artificial and unrealistic integration proposals of the other competing applicants, which range from the strange and unnatural to the unbelievable.

86. Unlike integration proposals, signal coverage proposals are the least likely to be changed after grant of the permit. Chapman Radio & Television Co., 19 FCC2d 185, 236, n. 38 (ALJ 1968), aff'd, 19 FCC2d 157 (Rev. Bd. 1969). Thus, unlike the typical contrived integration proposal, ORA's superior engineering and

signal coverage proposal is real and will have lasting benefits to the public. See, FBC, Inc., 95 FCC2d 256, 55 RR2d 1344, 1348, para. 12 (Rev. Bd. 1983), service to under-served areas is one of the Commission's basic missions.

87. ORA's engineering proposal is superior in other significant respects. Only it has a fully-spaced tower site under the current FM spacing rules. The competing applicants propose technically inferior short-spaced sites. Official notice of Commission files requested. See also, Jt. Ex. 1. Under Commission policy, a fully-spaced site is strongly preferred to a short-spaced site. See, North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (1985).

88. ORA also proposes the use of a non-directional antenna. The other applicants, with the exception of WII (whose engineering proposal is in any event decidedly inferior), propose the use of a directional antenna. Official notice of Commission files requested. See also, Jt. Ex. 1. Although the Commission allows the use of directional antennas in certain limited circumstances, their use is not favored. See, Sec. 73.215; MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). Accordingly, grant of the application of ORA would overall better serve the Commission's comparative hearing policies and better serve the public interest in view of its engineering superiority.

Conclusions

WHEREFORE, in view of the foregoing, the I.D. must be vacated and the application of ORA granted as the preferred applicant based upon its superior engineering proposal and signal coverage to under-served areas.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
Stephen T. Yelverton

December 20, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 20th day of December, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Exceptions to Initial Decision" to the following:

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